

“Down by the River”
Legal Tools for Watersheds and Evolving Federal Environmental Laws

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>>> HONOUR THE TREATIES <<<

NEIL YOUNG

WITH SPECIAL GUEST **DIANA KRALL**

JANUARY 12 TORONTO, MADISON SQUARE GARDEN
 JANUARY 13 CALGARY, ROCKY MOUNTAIN THEATRE
 JANUARY 15 WINNIPEG, CENTRAL OPERA HOUSE
 JANUARY 17 REGINA, CENTRAL OPERA HOUSE

**CONCERT SERIES IN SUPPORT OF
 ATHABASCA CHIPEWYAN FIRST NATION LEGAL DEFENSE**




“Greening” Water Law

Many legal tools available to protect watersheds
 Provinces, local govts making reforms
 Federal govt moving backwards?



Watersheds and water law reform

- Law sets rules about permissible extent of alteration to hydrological regimes by human activities.
- Environmental flow protection emerging in Canada, particularly in water stressed regions such as southern Alberta.
- No consistent approach across the country.
- Provincial water laws often are silent on the issue.
- Opportunity to include protection in new laws, such as BC’s proposed Water Sustainability Act



Presumptive Flow Standard

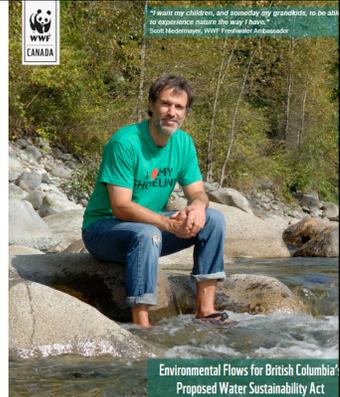
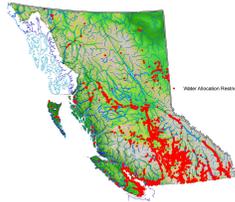
Many good intentions to protect environmental flows have stalled ...about which method for environmental flow assessment is appropriate or 'best' .**These real and perceived hurdles have too often resulted in doing nothing to protect environmental flows, leaving the vast majority of rivers on the planet vulnerable to over-exploitation**

Protecting 80% of daily flows will maintain ecological integrity in most rivers. A higher percentage of flow (90%) may be needed to protect rivers with at-risk species and exceptional biodiversity

Richter, B. D., Davis, M. M., Apse, C. and Konrad, C. (2011). A presumptive standard for environmental flow protection. *River Research and Applications*, 27, n/ a. doi: 10.1002/rra.1511



Proposed BC Water Sustainability Act



The Jobs, Growth, and Long Term Prosperity Act and the Damage Done



- Fisheries Act*- Habitat protection weakened
- Envntl Assessment Act*- Rewritten, reduced scope
- Species at Risk Act* - Pipeline approvals exempt from minimizing impacts to critical habitat
- Energy Board Act*- Participation Rights Curtailed, Final decision making power eliminated



Evolving Federal Fisheries Act



Laws to protect ecosystem services, like the *Fisheries Act* critical

Fish habitat was protected under the federal *Fisheries Act* in 1977

Reason?

Regulating fishing effort not enough

9



Fisheries Act (Old Federal)

Prohibits harmful alteration, disruption or destruction of fish habitat (HADD).

Can be invoked if water extraction causes HADD



Tell Me Why

- S.35.(2) was formerly supplemented by DFO's "No Net Loss of Fish Habitat" policy
- Developers/proponents who needed to harm or destroy fish habitat were required to replace or mitigate habitat
- Before new Act in 2012, CEAA environmental assessments required before s.35.(2) authorization could be issued
- *Fisheries Act* changes in effect as of November 25, 2013

11



Fisheries Protection Policy Statement

<http://www.dfo-mpo.gc.ca/habitat/habitat-eng.htm>

- Replaces the Policy for the Management of Fish Habitat
- Focuses on DFO's regulatory role in managing threats related to habitat degradation and loss, and flow alteration
- Explains the fisheries protection provisions and outlines how DFO will implement these provisions, with emphasis on:
 - Serious harm to fish (Section 35 prohibition)
 - Scope of application of the prohibition
 - Framework for decision-making (Sections 6 and 6.1)
- Will be supported by more detailed policy and operational guidance



New Act - Serious harm to fish (1)

- The Subsection 35(1) prohibition is against causing serious harm to fish that are part of a commercial recreational or Aboriginal fishery, or to fish that support such a fishery
- Authorization is required when projects are likely to result in a localized effect to fish populations or fish habitat in the vicinity of the project



New Act - Serious harm to fish (2)

DFO interprets serious harm to fish as:

- the **death of fish**;
- a **permanent alteration** of fish habitat of a spatial scale, duration and intensity that limits or diminishes the ability of fish to use such habitats as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes;
- the **destruction of fish habitat** of a spatial scale, duration, and intensity that fish can no longer rely upon such habitats for use as spawning grounds, or as nursery, rearing, or food supply areas, or as a migration corridor, or any other area in order to carry out one or more of their life processes.



Serious harm to fish (3) Other Views

Letter from 600 Canadian scientists ...” changing the law would be a most unwise action, which would jeopardize many important fish stocks and the lakes, estuaries and rivers that support them. We urge you to abandon this initiative as it is currently drafted.” Mar 2012

UBC Zoology Prof. Eric Taylor , Director Beaty Biodiversity Museum: "It's another knock against the inherent value of biodiversity — of all things, whether or not they have any immediate economic values, and I personally think that is regrettable.”

NATURE | NEWS 25 November 2013. Changes to Canada's fisheries law alarm biologists, Revisions that take effect today remove protections for 80% of endangered freshwater species.

15

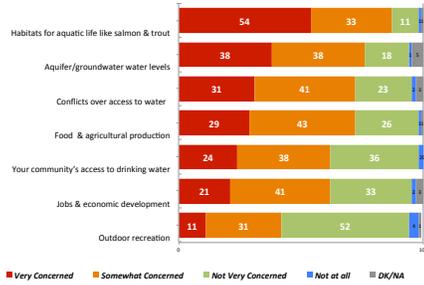


Scope of application

- Most water bodies in Canada contain fish, or fish habitat, that are part of, or support, a commercial, recreational or Aboriginal fishery, and thus are subject to the prohibition against causing *serious harm to fish*
- Notwithstanding the above, some water bodies may be specifically excluded from the application of federal or provincial regulations
- Some water bodies may not contain fish or provide fish habitat that are part of or support commercial, recreational or Aboriginal fisheries. Such water bodies may not require authorization



How concerned are you about the **IMPACT OF water SHORTAGES** in the next 10 years on...



Only Laws Can Break Your Heart

Bill C-38 changed regulation of major projects like oil sands developments and pipelines with significant impacts on watersheds

National Energy Board Act amended:

- Contrary to Charter?
- New NEB-DFO MOU



"Directly Affected"

Bill C-38 changed public participation rights at NEB hearings



Democracy, Environment at Risk

August 13, 2013 NEB Act Court Challenge:

In 2012, the Harper government made legislative changes that unreasonably restrict the rights of everyday Canadians to have their say on proposed oil projects. This violates citizens' rights to free speech and puts our natural environment at risk. In their legal action, the plaintiffs ask the Federal Court to strike down provisions of the National Energy Board Act that unduly restrict public comment on project proposals.

FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR Applicants
and
THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA Respondents



Application to strike down s 55.2 NEB Act as violation s 2(b) Charter guarantee of freedom of expression

- 55.2.** On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is **directly affected**
- by the granting or refusing of the application,
 - and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive



Memorandum of Understanding between the National Energy Board and Fisheries and Oceans Canada for Cooperation and Administration of the Fisheries Act and the Species at Risk Act Related to Regulating Energy Infrastructure December 16, 2013

- MOU makes NEB responsible for assessing potential impacts to fisheries from proposed NEB regulated pipeline and power line applications.
- MOU gives NEB power to:
 - review a project under the Fisheries Protection Provisions of the Fisheries Act to determine if impacts shall occur, and if a Fisheries Act authorization is required
 - determine if proposed projects will impact aquatic species at risk and require permitting under the Species at Risk Act.
- If the NEB determines that an authorization or permit will be required, DFO shall be notified and will be responsible for issuing the authorization or permit.

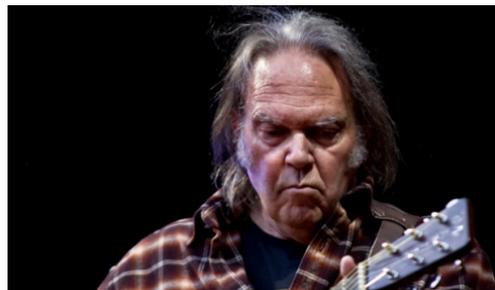


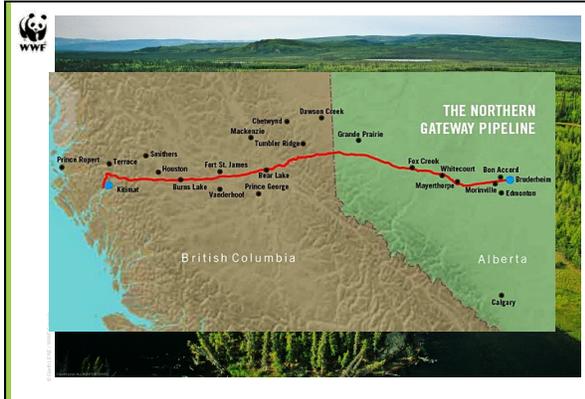
Green Party Fisheries Critic Janice Harvey

"The NEB is not an environmental regulatory agency and it does not have a mandate to protect species or habitats or fisheries. Environmental protection, or any other regulatory function designed to protect the public good in the face of economic expansion, needs to be arms length and independent of economic mandates. Without this, conflicts of interest are rife through the regulatory process. There are no checks and balances. Further, without the scientific and environmental management expertise now residing in DFO, there would not be the proper scrutiny of permits and writing of conditions, or, denial of permits."



Joint Review Panel Decisions Tell Me Why





Justified in the Circumstances

What sort of justification analysis is necessary when a Joint Review Panel makes a recommendation about approval of a major project? Issue at stake in:

Jackpine oil sands expansion lawsuit (AFCN court challenge)

- No Justification given
- Enbridge Northern Gateway case
- Inadequate justification given



ENG- Adverse Effects on Watersheds



- Project will likely cause adverse, but not significant, environmental effects on:
 - a number of ecosystem components including rare plants, rare ecological communities, soils, old-growth forests, wetlands, surface and groundwater resources, fish habitat, and marine water and vegetation.
 - a variety of animal species (including many species at risk).
- Significant** adverse environmental effects will occur to caribou and grizzlies (and no other species?)



Hey, Hey, My, My

The Enbridge JRP concluded that: the significant negative impacts could be justified in the circumstances because “[t]he potential adverse environmental outcomes are, in the Panel’s view, outweighed by the potential social and economic benefits described [in Chapter 2]” the JRP’s discussion, in its role under the *National Energy Board Act*, as to whether the NGP is in “the public interest.”



Justification - ENG

- NGP is in the public interest due to:
- jobs and job-training for Aboriginal communities
 - “research, monitoring, and planning initiatives and techniques with relevance beyond the project” and economic benefits
 - And...?



Four Strong Winds

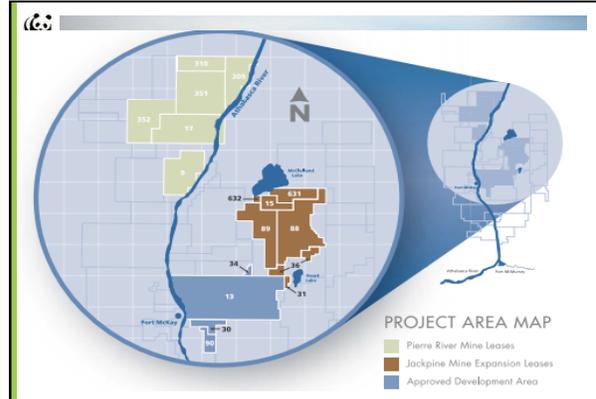
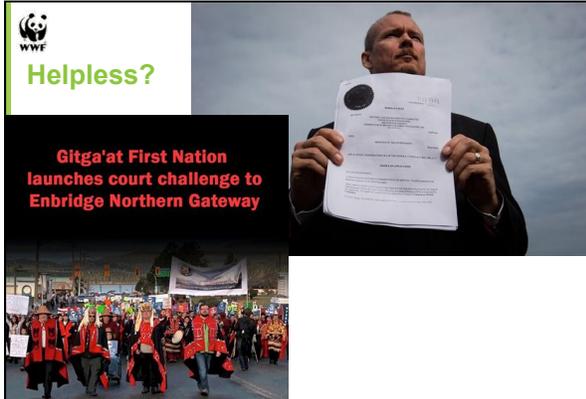
the importance of “opening Pacific Basin markets” (NGP Report, Volume II, Chapter 2, s. 2.4.3 and 2.4.4.).

“Canadians will be better off with this project than without it.”



Don't Let It Bring You Down





Jackpine Expansion

July 2013, JRP decision to approve the expansion:

"The panel also concludes that the project, in combination with other existing, approved, and planned projects, **would likely have significant adverse cumulative environmental effects** on wetlands; traditional plant potential areas; old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest-reliant species at risk and migratory birds; caribou; biodiversity; and Aboriginal traditional land use (TLU), rights, and culture. Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects."

- Excerpts - Jackpine JRP Decision**
- *The Panel understands that a **large loss (over 10,000 hectares) of wetland would result from the Project, noting in particular that 85 per cent of those wetlands are peatlands that cannot be reclaimed.***
 - *The Panel finds that diversion of the Muskeg River is in the public interest, **considering that approximately 23 to 65 million cubic metres of resource would be sterilized if the river is not diverted***
 - *The Panel notes that a **substantial amount of habitat for migratory birds that are wetland or old-growth forest dependent will be lost entirely or lost for an extended period;***



My, My, Hey, Hey

Jackpine Joint Review Panel concluded – for the first time in the oil sands context – that the project was likely to result in numerous significant adverse environmental effects.

This conclusion triggered the application of subsection 52(2) of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 (CEAA, 2012), pursuant to which the Governor in Council must determine whether the project is nevertheless “justified in the circumstances.”

42



Shell Jackpine Mine Expansion Project: The Mysterious Case of the Missing Justification

- Shell Jackpine Decision Statement simply states that “[in] accordance with paragraph 52(4)(a) of CEAA 2012 the Governor in Council decided that the significant adverse environmental effects that the Designated Project is likely to cause, are justified in the circumstances.
- *Total* absence of any explanation or reasons fundamentally undermines the process of *political* accountability that this element of CEAA, 2012 (a holdover from CEAA, 1992) was intended to facilitate , Ablawg [December 12, 2013](#) [Martin Olszynski](#)

43



Comes A Time

[Athabasca Chipewyan First Nation announce new legal filing challenging the recent Jackpine Mine approval](#)



44



After the Oil Rush



Canadian Geographic, October 2010

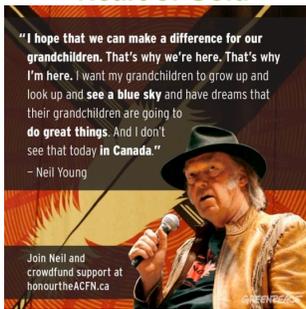


Heart of Gold

"I hope that we can make a difference for our grandchildren. That's why we're here. That's why I'm here. I want my grandchildren to grow up and look up and see a blue sky and have dreams that their grandchildren are going to do great things. And I don't see that today in Canada."

- Neil Young

Join Neil and crowdfund support at honourtheACFN.ca



47



LONG MAY YOU RUN